



**SO ORDERED.**

**SIGNED this 11 day of March, 2005.**

  
JANICE MILLER KARLIN  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

<b>In re:</b>	)	
<b>REDIE B. LEWIS</b>	)	<b>Case No. 03-41515</b>
	)	<b>Chapter 13</b>
<b>Debtor.</b>	)	
_____	)	
<b>REDIE B. LEWIS</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Adversary No. 03-7068</b>
	)	
<b>BNC MORTGAGE, INC.,</b>	)	
<b>OPTION ONE MORTGAGE CORP.,</b>	)	
<b>FIRST UNION NATIONAL BANK,</b>	)	
<b>KOZENY &amp; MCCUBBIN, L.C.,</b>	)	
<b>MILLER ENTERPRISES, INC.,</b>	)	
<b>JEFFREY MILLER, Individually, )</b>	)	
<b>ADAMSON &amp; ASSOCIATES, INC.,</b>	)	
<b>MAPLEWOOD MORTGAGE, INC.,</b>	)	
<b>and DOES 1-100 Inclusive.</b>	)	
	)	
<b>Defendants.</b>	)	
_____	)	

**MEMORANDUM AND ORDER DENYING THREE MOTIONS  
FOR SANCTIONS RELATING TO PLAINTIFF’S SECOND  
AMENDED COMPLAINT FILED BY FIRST UNION  
NATIONAL BANK, OPTION ONE MORTGAGE CORP.,  
AND KOZENY & MCCUBBIN, L.C.**

This matter is before the Court on motions for sanctions filed by Defendants First Union National Bank,<sup>1</sup> Kozeny & McCubbin, L.C.,<sup>2</sup> and Option One Mortgage Corp.<sup>3</sup> (hereafter “Defendants”). Each relate to Plaintiff’s Second Amended Complaint,<sup>4</sup> which this Court has recently dismissed.<sup>5</sup> The Court has jurisdiction to hear this case as it is related to the bankruptcy case that arises under Title 11 of the United States Code, and the parties have all consented to the Court hearing and determining the issues involved in this case and entering all appropriate orders and judgments.<sup>6</sup>

Defendants are seeking sanctions under Fed. R. Bankr. P. 9011(c). Rule 9011 provides, in pertinent part, as follows:

**a) Signing of papers**

Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the

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<sup>1</sup>Doc. 184.

<sup>2</sup>Doc. 204.

<sup>3</sup>Doc. 205.

<sup>4</sup>Doc. No. 130.

<sup>5</sup>Doc. No. 216.

<sup>6</sup>28 U.S.C. § 1334 and 28 U.S.C. § 157(c)(2). *See also* Doc. No. 117, which is an order entered June 16, 2004, confirming that all parties have provided written consent to allow this Court to hear and determine this case and enter all appropriate orders and judgments pursuant to 28 U.S.C. § 157(c)(2), subject to review under 28 U.S.C. § 158.

attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

**(b) Representations to the court**

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

**(c) Sanctions**

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.<sup>7</sup>

Accordingly, Rule 9011(c) provides the Court with the authority to impose appropriate sanctions upon attorneys, law firms or parties if the Court finds that subsection (b) has been violated.

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<sup>7</sup>Fed. R. Bankr. P. 9011(a) and (b). All future references to "Rule" refer to the Federal Rules of Bankruptcy Procedure.

Sanctions under Rule 9011(c) may be initiated by an opposing party under Rule 9011(c)(1)(A), but several procedural prerequisites exist. First, Rule 9011(c)(1)(A) requires that a motion for sanctions be filed separately from other motions or requests, and also requires that the motion describe the specific conduct alleged to violate subdivision (b). Second, Rule 9011(c)(1)(A) requires that the motion for sanctions “be served as provided in Rule 7004.” Third, this Rule requires that:

The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b).<sup>8</sup>

These limitations found in Rule 9011(c)(1)(A) are generally referred to as the “safe harbor” provisions.

This provision is designed to give parties the opportunity to withdraw or correct the offending pleading or other potentially sanctionable conduct before the Court is asked to intercede.<sup>9</sup> The only exception to this requirement is if the moving party claims that the violation of Rule 9011(b) is the filing of all or part of a bankruptcy petition, which is not what is alleged in this case.<sup>10</sup>

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<sup>8</sup>Fed. R. Bankr. P. 9011(c)(1)(A).

<sup>9</sup>*In re Shubov*, 253 B.R. 540, 545 (9<sup>th</sup> Cir. B.A.P. 2000); *see also In re Fisher*, 2003 WL 23807835 at \*6 (Bankr. D. Kan. 2003) (noting that federal cases have held that failure to comply with the safe harbor provisions of Fed. R. Civ. P. 11(c) are fatal to a motion for sanctions, and applying those holdings to a motion for sanctions brought under Fed. R. Bankr. P. 9011(c)).

<sup>10</sup>Although attorneys often use the terms “complaint” and “petition” interchangeably, the two terms have very distinct, and different, meanings in the Bankruptcy Code. As they relate to this case, the “petition” is the document that was filed by Debtor in order to initiate the main bankruptcy case, (Case No. 03-41515), whereas the “complaint” is the document that was initially filed by Debtor (later twice amended by her counsel, Mr. Toth), to initiate the adversary proceedings that involve these Defendants (Adversary Proceeding No. 03-7068). Defendants are alleging that the sanctionable conduct arose from the filing of the adversary complaints, not the filing of the bankruptcy petition, thus rendering the only exception to the safe harbor provisions inapplicable to this case.

None of the three movants have plead that they complied with the safe harbor provisions of Rule 9011(c)(1)(A) by first serving a copy of the motion for sanctions on Plaintiff at least 21 days prior to the filing of the motion for sanctions.<sup>11</sup> The Court has been unable to locate any document within the record or referenced in the specific motions that indicates these Defendants complied with the requirements of Rule 9011(c)(1)(A) by serving Plaintiff with a copy of the motion at least 21 days prior to the filing of the motion for sanctions, to allow her time to withdraw the claims that form a basis for the motions for sanctions.

Because it appears Defendants have not complied with the requirements found in Rule 9011(c)(1)(A), the Court denies their Motions for Sanctions as they relate to the Second Amended Complaint, without prejudice. If Defendants did comply with the safe harbor provisions found in Rule 9011(c)(1)(A), and simply neglected to file the appropriate Certificate of Service with the Court, and if they wish to continue pursuit of sanctions in this matter, they should file a motion to reconsider under Rule 9023, within ten days. Any such motion must include proof of compliance with the advanced service requirement of Rule 9011(c)(1)(A).<sup>12</sup>

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<sup>11</sup>The Court notes that Defendants Kozeny & McCubbin and Option One Mortgage Corp. appear to be aware of the prior notice requirements under Rule 9011(c)(1)(A), as they appear to have complied with the safe harbor requirements when they filed an earlier motion for sanctions relating to the First Amended Complaint. In that instance, they filed a Certificate of Service indicating they had served a copy of the Motion for Sanctions on April 16, 2004, which was more than 21 days prior to the date they actually filed their Motion for Sanctions, on May 27, 2004. *See* Doc. Nos. 108 and 109, and Doc. Nos. 114 and 115.

<sup>12</sup>The Court would also note that if these Defendants did fail to provide the required advanced notice, it appears that it is now too late to do so because the Court has already dismissed Plaintiff's Second Amended Complaint. For that reason, Plaintiff and her counsel obviously cannot now withdraw the offending pleading, which is the main purpose of that requirement.

**IT IS, THEREFORE, BY THIS COURT ORDERED** that First Union National Bank's Motion for Sanctions Against Plaintiff and her Attorney Pursuant to FRBP 9011 (Doc. 184), Defendant Kozeny & McCubbin, L.C.'s Motion for Sanctions under Bankruptcy Rule 9011 as to Plaintiff's Second Amended Complaint (Doc. 204) and Option One Mortgage Corp.'s Motion for Sanctions under Bankruptcy Rule 9011 as to Plaintiff's Second Amended Complaint (Doc. 205) are denied, without prejudice.

**IT IS FURTHER ORDERED** that any of these Defendants may file a motion to reconsider, pursuant to Fed. R. Bankr. P. 9023, within ten (10) days, if they in fact complied with the requirements of Fed. R. Bankr. P. 9011(c)(1)(A), and they wish to continue pursuit of sanctions for the filing of the Second Amended Complaint. Any such motion to reconsider shall contain proof of compliance with Fed. R. Bankr. P. 9011(c)(1)(A).

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